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No. 85-973

In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE VERNON HANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner violated 18 U.S.C. 1001 by filing false financial disclosure statements under the Ethics in Government Act, 2 U.S.C. 701 *et seq.*

2. Whether the question of the materiality of petitioner's false statements should have been submitted to the jury.

3. Whether the district court abused its discretion in admitting expert testimony to rebut petitioner's advice-of-counsel defense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 772 F.2d 940. The memorandum opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 23a-47a) is reported at 566 F. Supp. 162. The district court's orders on various motions (Pet. App. 48a-51a, 52a-67a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1985, and a petition for rehearing was denied on November 1, 1985 (Pet. App. 21a). The petition for a writ of certiorari was filed on December 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on four counts of making false statements, in violation of 18 U.S.C. 1001, and sentenced to five to 15 months' imprisonment and a fine of $40,000. The court of appeals affirmed. Pet. App. 1a-20a.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner, a former Member of Congress, failed to report certain transactions on the financial disclosure statements that he was required to file pursuant to the Ethics in Government Act (EIGA), 2 U.S.C. 701 *et seq.*, for the years 1978 through 1981. The Act requires each Member to disclose in an annual report filed with the Clerk of the House of Representatives information concerning income, debts, gifts received, and financial holdings and transactions. 2 U.S.C. 702(a). Each congressman must also report the financial holdings, debts, and transactions of his or her spouse except with respect to items wholly independent of the Member's own financial affairs. 2 U.S.C. 702(d)(1)(D).

Three of the four charged offenses related to petitioner's dealings with financier Nelson Bunker Hunt. Sometime before April 1977, petitioner sought Hunt's assistance in paying debts of at least $300,000. Tr. 81-82. Hunt agreed to help petitioner by arranging for petitioner's wife, Connie Hansen, to profit through various investments. Tr. 85. In one instance, Hunt instructed a broker to trade in soybean futures for Mrs. Hansen. When the trading resulted in a loss, Hunt arranged for Mrs. Hansen to obtain a $50,000 loan from a Dallas bank. Tr. 97-102, 208, 258-259. Hunt later purchased the loan from the bank for $61,000, making Mrs. Hansen liable to him for that amount. Tr. 103-104, 275. In another transaction, Hunt arranged for petitioner's wife to obtain an $87,000 profit through trading in silver

commodity futures. Tr. 114-115, 321-329, 371-372. Petitioner fully participated in each of these transactions: the proceeds were deposited into joint accounts maintained by him and his wife and were used by petitioner for personal expenses. Tr. 292-301, 447-452, 469-470. The fourth offense involved $135,000 in loans received by petitioner from individuals whom he was assisting in efforts to promote a hydrogen-powered automobile to the United States Army. *E.g.*, Tr. 512-530, 559-571, 696-697, 710-716.

Petitioner failed to report any of these loans or the commodity profit on his financial disclosure statements. He claimed at trial that he had relied on his attorneys' advice that the Hunt transactions were not reportable in view of a property agreement between petitioner and his wife and that the other funds were borrowed on behalf of a nonprofit taxpayer organization. The district court admitted testimony of a government attorney concerning the requirements of EIGA to rebut petitioner's advice-of-counsel defense. See Pet. App. 58a-60a.

2. The court of appeals affirmed. Pet. App. 1a-20a. The court held that 18 U.S.C. 1001, which broadly proscribes the making of false statements to the government, applied to petitioner's false statements on his EIGA reports in the absence of any clear congressional intent to exempt such reports from the false statements statute. Pet. App. 3a-15a. The court also determined that petitioner's omissions on his forms were material and that this question was properly resolved by the district court and did not have to be submitted to the jury. *Id.* at 15a-18a. The court of appeals agreed with the district court's rejection of various other contentions raised by petitioner. *Id.* at 20a.

ARGUMENT

1. Petitioner contends primarily (Pet. 13-19) that his deliberate filing of false financial disclosure statements under the EIGA may not be prosecuted under the federal

false statements statute, 18 U.S.C. 1001. In the first appellate opinion addressing the issue, the court of appeals rejected petitioner's contention in a well-reasoned analysis (Pet. App. 3a-15a), on which we rely. Briefly, the court of appeals concluded that Section 1001 is by its terms "plainly applicabl[e]" to petitioner's conduct (*id.* at 4a), that nothing in the language or legislative history of the EIGA indicates that Congress clearly intended to make Section 1001 inapplicable to violations of the Act (*id.* at 6a-10a, 11a-14a), and that requiring EIGA to state expressly that Section 1001 applies to violations of its provisions would "deprive[] 1001 of its plainly intended self-operative effect" (*id.* at 10a). See also *id.* at 29a-35a (district court's discussion of EIGA's legislative history, reaching the "inescapable conclusion * * * that Congress simply did not intend to render section 1001 inapplicable to the intentional falsification of EIGA financial disclosure reports").

The decision of the court of appeals is fully in accord with this Court's precedents recognizing the breadth of Section 1001 (*e.g., United States* v. *Yermian*, No. 83-346 (June 27, 1984)) and the heavy burden that must be shouldered in order to demonstrate that Congress impliedly repealed one statutory provision by enacting another (*e.g., TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978)).[1] Should Congress wish to

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[1]Petitioner's attempt (Pet. 16) to recast his claim in terms that would avoid the doctrine disfavoring implied repeals is palpably flawed. Section 1001 by its terms indisputably applies to false reports filed under the EIGA. The question therefore is not whether Congress manifested a clear intent in the EIGA to make such filings criminal—that had already been accomplished—but rather whether Congress clearly intended to exempt EIGA violations from what would otherwise be the reach of Section 1001. See Pet. App. 4a-5a. Petitioner's reliance (Pet. 16) on the rule of lenity is particularly misplaced: not only does Section 1001 by its terms unambiguously apply to petitioner's misconduct, but the forms filed by petitioner expressly advised that false statements would be subject to criminal penalties under that statute. See Pet. App. 15a.

exempt its members from criminal penalties in this area, it is of course free to consider amending the EIGA. This Court should not undertake to accomplish the same result merely on the basis of the snippets of legislative history on which petitioner relies.

Dowling v. *United States*, No. 84-589 (June 28, 1985), relied on by petitioner (Pet. 16-18), is altogether inapposite. There, the Court held that the National Stolen Property Act, 18 U.S.C. 2314, does not apply to the interstate transportation of certain "bootleg" phonograph records. Contrary to petitioner's assertion (Pet. 17) that Section 2314's literal language reached this conduct, the Court concluded (*Dowling*, slip op. 9) that "the common-sense meaning of the statutory language" did not proscribe the transportation in question. It was in the context of such "ill-fitting language" (*id.* at 11) and the absence of congressional intent to proscribe conduct such as the defendant's in that case (*id.* at 11-14) that the Court went on to observe as well that Congress has "chiefly relied on an array of civil remedies" rather than criminal sanctions in the area of copyright infringement (*id.* at 14). In contrast, the language and legislative history of Section 1001 make clear beyond doubt that it applies to petitioner's false filings. See generally *United States* v. *Rodgers*, 466 U.S. 475 (1984). The Court in *Dowling* simply had no occasion to address the question whether a civil remedy may impliedly repeal an otherwise plainly applicable criminal sanction. And as the court of appeals demonstrated, there is no basis for finding such an implied repeal in this case.

2. Petitioner argues next (Pet. 19-21) that the question of the materiality of his false financial disclosure statements should have been submitted to the jury. This Court has repeatedly denied certiorari in cases presenting the same contention and relying upon the same alleged conflict among the circuits. See, *e.g.*, *United States* v. *Greber*, 760

F.2d 68 (3d Cir. 1985), cert. denied, No. 85-35 (Nov. 12, 1985); *Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d 362 (4th Cir. 1985), cert. denied, No. 84-1771 (Oct. 7, 1985); *United States* v. *Elkin*, 731 F.2d 1005 (2d Cir. 1984), cert. denied, No. 83-1848 (Oct. 1, 1984); *United States* v. *Abadi*, 706 F.2d 178 (6th Cir.), cert. denied, 464 U.S. 821 (1983). There is no reason for a different result here.

Petitioner recognizes (Pet. 21) that the court of appeals' holding that materiality is an issue of law is consistent with the law in the majority of circuits. See, *e.g.*, *United States* v. *Greber*, 760 F.2d at 73; *Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d at 367; *United States* v. *Elkin*, 731 F.2d at 1009; *United States* v. *Abadi*, 706 F.2d at 180; *United States* v. *Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983); *United States* v. *Fern*, 696 F.2d 1269, 1274 (11th Cir. 1983); *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *United States* v. *Clancy*, 276 F.2d 617, 635 (7th Cir. 1960). The holding also accords with this Court's recognition that the materiality of false statements generally is a question for the court (*Sinclair* v. *United States*, 279 U.S. 263, 298 (1929)), and with the generally accepted pattern jury instructions (see 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 28.09 (3d ed. 1977)). Petitioner contends, however, that the Ninth and Tenth Circuits have approved the practice of submitting the question of materiality to the jury (see *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979)) and that this conflict warrants resolution by this Court.[2]

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[2]Petitioner's reliance (Pet. 20-21) on *United States* v. *Johnson*, 718 F.2d 1317 (5th Cir. 1983) (en banc), is misplaced. The court there expressly adhered to the rule followed by the court of appeals in this

Petitioner has cited no case, however, and we are aware of none, in which a court has overturned a conviction under 18 U.S.C. 1001 on the ground that the issue of materiality was not submitted to the jury. The Tenth Circuit has approved the practice of submitting it to the jury (*Irwin*, 654 F.2d at 677 n.8); the Ninth Circuit has characterized the failure to do so as error, while nevertheless affirming the convictions in question because materiality had been so clearly established (*Valdez*, 594 F.2d at 729). In this case, petitioner does not now argue that his failure to report financial transactions involving sums ranging from $50,000 up to $135,000 was not material, and their materiality indeed cannot be doubted, for the reasons stated by the court of appeals. Pet. App. 15a-18a. Since petitioner's "falsification[s] pertain[] specifically to the area the [congressional committee] is charged to investigate (a filing Member's financial transactions), and tend[] to conceal in any degree * * * material that would prompt or affect an investigation" (*id.* at 18a), it is clear that the false filings "had a 'natural tendency to influence, or [were] capable of affecting or influencing, a governmental function' " (*United States* v. *Diaz*, 690 F.2d 1352, 1357 (11th Cir. 1982), quoting *United States* v. *Markham*, 537 F.2d 187, 196 (5th Cir. 1976), cert. denied, 429 U.S. 1041 (1977)). Where the materiality of petitioner's false filings is so clearly established, there is no reason to believe that any other court of appeals would have granted petitioner the relief he seeks. Thus, to whatever extent a conflict may exist,[3] the present case does

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case that "the materiality of false statements is a question for the court." *Id.* at 1324 (footnote omitted). The court merely refused to extend this settled principle to the question whether a document was a "security" within the meaning of 18 U.S.C. 2314.

[3]The Ninth and Tenth Circuits have held that materiality is an issue of law to be decided by the court in prosecutions for false statements under 26 U.S.C. 7206(1) (*United States* v. *Flake*, 746 F.2d 535, 537 (1984), cert. denied, No. 84-6013 (Feb. 19, 1985); *United States* v. *Strand*, 617

not provide an appropriate occasion for this Court to address it.

3. Finally, petitioner contends (Pet. 21-23) that the district court abused its discretion in admitting testimony by an expert witness to rebut petitioner's advice-of-counsel defense. The court of appeals did not consider this fact-bound issue worthy of separate discussion (Pet. App. 20a); the district court demonstrated why the evidence was admissible in its order denying petitioner's motion for a new trial (*id.* at 58a-60a). It was petitioner who injected the issue of the reasonableness of his attorneys' interpretation of the EIGA into the case, and the government's rebuttal testimony did not usurp the judge's function to instruct the jury on the governing law. Rather, as the district court noted, the evidence served simply "to impeach the credibility of [petitioner's] witnesses and to raise the question of whether or not [petitioner] acted in good faith in relying on his attorneys' advice." *Id.* at 58a. The district court's admission of this evidence was well within its discretion. See, *e.g.*, *United States* v. *Clardy*, 612 F.2d 1139, 1153 (9th Cir. 1980) (expert testimony on the law "is relevant to the issue of willfulness where the theory of the defense is that there is a good faith dispute as to the interpretation of the * * * law[]").

United States v. *Zipkin*, 729 F.2d 384 (6th Cir. 1984), on which petitioner relies (Pet. 22), is not to the contrary, as the district court explained (Pet. App. 59a). The defendant in that embezzlement prosecution was a bankruptcy receiver. The bankruptcy judge under whose order the defendant was acting was permitted to testify at trial on behalf of the

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F.2d 571, 574, cert. denied, 449 U.S. 841 (1980)) and in prosecutions for perjury (*United States* v. *Prantil*, 756 F.2d 759, 769 (1985); *United States* v. *Masters*, 484 F.2d 1251, 1254 (1973)), contexts not readily distinguishable from prosecutions under Section 1001.

government with respect to the proper interpretation of bankruptcy law and the order that he had issued. Understandably, the court of appeals concluded that this testimony was highly prejudicial. 729 F.2d at 387. Moreover, unlike here, the defendant in *Zipkin* did not defend on the basis of the reasonableness of another interpretation of the law. As the district court correctly reasoned (Pet. App. 59a (emphasis in original)), "*Zipkin* does not preclude expert legal testimony *in rebuttal* where the central issue is defendant's subjective view of the requirements of the law." None of the other cases relied on by petitioner (Pet. 22-23) holds the admission of expert testimony reversible error in circumstances similar to those presented here.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]In any event, the introduction of the evidence in question did not prejudice petitioner in view of the district court's instruction that the jury should give the testimony "whatever weight it felt it deserved, accounting for any bias [the witness] might have toward the government, and that, indeed, [the jury] was free to reject it in its entirety." Pet. App. 58a; see *United States* v. *Clardy*, 612 F.2d at 1153. We note as well that petitioner does not now directly dispute the correctness of the government witness's testimony.